No. 77-1027

In the Supreme Court of the United States

OCTOBER TERM, 1977

JOHN DOE, ET AL., PETITIONERS

v.

JOHN L. MCMILLAN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PUBLIC PRINTER AND SUPERINTENDENT OF DOCUMENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-17a) and its order denying rehearing (Pet. App. 18a-21a) are reported at 566 F. 2d 713. The opinions of the district court (Pet. App. 1a-2a, 23a-30a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on July 29, 1977. A timely petition for rehearing was denied on October 13, 1977. On December 8, 1977, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including February 13, 1978. The petition was filed on January 19, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED[1]

1. Whether the limited public distribution of the congressional report in question was within the legitimate legislative needs of Congress, so that the Public Printer and Superintendent of Documents are immune from suit under the Speech or Debate Clause of the Constitution.

2. If not, whether the Public Printer and Superintendent of Documents are entitled to qualified immunity on this record.

STATEMENT

1. This case has been before this Court previously. *Doe* v. *McMillan*, 412 U.S. 306. Petitioners seek declaratory and injunctive relief and damages against various Members of Congress, their staffs and consultants, District of Columbia school officials, and the Public Printer[2] and Superintendent of Documents, based on the publication of a committee report that allegedly invaded petitioners' right to privacy. The report concerned disciplinary and other problems in the District of Columbia schools and identified the students involved by name. Petitioners are these students and their parents.

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[1]The Department of Justice represents only the Public Printer and the Superintendent of Documents. Accordingly, we have not addressed the third question presented in the petition, which relates to other respondents.

[2]By order dated April 14, 1976, the court of appeals vacated the district court's judgment concerning defendant Spence, the former Public Printer, by then deceased, and ordered the action against him abated. Petitioners contended in the court of appeals that the current Public Printer was substituted as a defendant on Spence's death. But because the only issues remaining relate to damage claims, we submit that substitution is not available in this case. (The court of appeals found it unnecessary to decide the question of substitution (see Pet. App. 15a n. 8).) Because petitioners have not presented the abatement question for decision by this Court, we assume that Spence is no longer a party and that no substitution is appropriate. See *Spomer* v. *Littleton*, 414 U.S. 514, 520.

The district court dismissed the complaint. The court of appeals affirmed, holding that the Members of Congress and legislative employees were acting within the sphere of legitimate legislative activity and thus were protected from suit by the Speech or Debate Clause of the Constitution. The court of appeals further held that the legislative employees and the District of Columbia defendants were entitled to official immunity under *Barr* v. *Matteo*, 360 U.S. 564. The court considered the Public Printer and Superintendent of Documents (Printer defendants) to have the same immunity as the legislative employees.

This Court affirmed the judgments in favor of the Members of Congress, their employees, and the District of Columbia officials (412 U.S. at 314-318 and 324 n. 15), but it concluded that the complaint against the Printer defendants should not have been dismissed before the district court had determined "whether any part of the previous publication and public distribution" by the Printer defendants went beyond the limits of the legislative immunity provided by the Speech or Debate Clause (412 U.S. at 318). The Court also held that the Printer defendants did not exercise significant discretion and thus were not entitled to claim the absolute official immunity of *Barr* v. *Matteo, supra*. The case was remanded for further proceedings.

2. On remand the Public Printer submitted an affidavit (Pet. App. 33a-41a) setting forth what he thought at the time was the distribution of the report. On the basis of that affidavit, the district court determined that the

distribution "did not exceed the legitimate legislative needs of Congress and thus [the Printer defendants'] actions remained within the limits of immunity of the Speech or Debate Clause and the doctrine of official immunity" (*id.* at 30a).

On appeal, the Printer defendants informed the court that new information regarding the distribution of the report had been discovered, and that there had been wider distribution of the report than was indicated on the record. The court of appeals therefore vacated the judgment of the district court and remanded the case for consideration of the significance of the factual error. On remand, the Public Printer submitted another affidavit (Pet. App. 42a-60a) stating that some of the copies previously assumed to have been distributed to government agencies probably had been used to fill standing requisitions by members of the public for all government reports. Although the Public Printer kept no record of which of these members of the public were in fact sent a copy of the Report, he estimated that approximately 92 copies were distributed to private parties pursuant to standing orders (*id.* at 46a-48a).[3] He also stated that 80 copies probably had been delivered to foreign legations as required by 44 U.S.C. 1717 (*ibid.*).

On the basis of this new affidavit, the district court again granted the defendants' motion for summary judgment, concluding that the factual error in the Public Printer's initial affidavit did not affect its prior conclusion that the distribution did not exceed the legitimate legislative needs of Congress (Pet. App. 1a-2a).

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[3]Standing orders are maintained by law firms, university law libraries, law publishers such as Commerce Clearing House, newspapers, and a few corporations (see Pet. App. 53a-60a).

The court of appeals affirmed. It held that this Court had "left it for the district court in the first instance to determine both the actual extent of distribution *and* whether that distribution as a matter of fact and law served a 'legitimate legislative need,' and was therefore within the privilege" (Pet. App. 11a; emphasis in original). The court of appeals agreed with the district court that the distribution that occurred in this case, including the limited distribution to the public, was within the "legitimate legislative needs of Congress" (*id.* at 12a-13a) and thus is protected by the Speech or Debate Clause. The Printer defendants also are entitled to qualified immunity, the court held, because they acted within the scope of their duty, in good faith, and with a reasonable belief in the legality of their actions (Pet. App. 13a-15a).

ARGUMENT

1. Petitioners contend (Pet. 7) that any public distribution of a congressional report exceeds the legitimate legislative needs of Congress, and that the district court and court of appeals violated this Court's previous decision by deciding otherwise. But this Court did not hold that any public distribution of any congressional report always exceeds the scope of protected activity. The Court considered only the proposition that public distribution, "simply because authorized by Congress, must *always* be considered 'an integral part of the [legislative] * * * processes * * *' " (412 U.S. at 314, emphasis added, quoting *Gravel* v. *United States*, 408 U.S. 606, 625). The Court rejected that proposition, deciding, as the court of appeals put it, "only that [public] distribution was not *necessarily privileged*" (Pet. App. 9a; emphasis in original).

Because the Court was "unaware" from the record before it "of the extent of the * * * distribution of the report * * *" (412 U.S. at 324), it remanded for a resolution of the question "whether any part of the * * * publication and public distribution * * * went beyond the limits of the legislative immunity provided by the Speech or Debate Clause" (412 U.S. at 318). This Court thus "left it for the district court in the first instance to determine both the actual extent of distribution *and* whether that distribution as a matter of fact and law * * * was * * * within the privilege" (Pet. App. 11a; emphasis in original).

The courts correctly resolved those issues here. Approximately 92 copies of the report were distributed to members of the public. The distribution was routine and ordinary, although substantially more limited in scope than the normal distribution of a report (Pet. App. 11a). Copies were sent only to parties who, by placing standing orders for all reports, indicated an interest in all matters before Congress (*id.* at 12a). The Printer defendants made no attempt to call attention to the report or to enlarge in any way the normal distribution. No copies were provided to the public in response to specific requests for this report. Distribution ceased once objections to the contents of the report were received (*id.* at 11a-12a).

Such limited and automatic public distribution[4] serves the important legislative purpose of "informing the public about the business of Congress" (412 U.S. at 314; see *id.*

[4]The court of appeals resolved this case on its facts and did not decide "the proper result in a case where distribution was more extensive, was specially promoted, was made in response to specific requests rather than standing orders, or continued for a period after notice of objections was received" (Pet. App. 13a). The court of appeals' opinion accordingly appears to be of limited significance.

at 328 (Douglas, J., concurring), 332-334 (Blackmun, J.).[5] Automatic distribution enables members of the public promptly to evaluate proposed congresssional action and to exercise with intelligence their constitutional rights to petition and speak. This in turn permits Congress to receive from the public constructive comments and suggestions and thereby aids Congress in its legislative task.

2. Petitioners also contend (Pet. 12-13) that this Court's prior decision in this case precluded the court of appeals from holding that the Printer defendants are entitled to qualified immunity. Petitioners are mistaken. The Court considered the availability of two forms of absolute immunity— legislative immunity and immunity of executive officials. It held with respect to legislative immunity that there was not sufficient information in the record to determine its availability, and with respect to executive official immunity that the Printer defendants did not exercise sufficient discretion. The Court, however, explicitly left open the possibility that other defenses might be available: "we indicate nothing," the Court said, "as to whether petitioners have pleaded a good cause of action or whether respondents have other defenses, constitutional or otherwise" (412 U.S. at 325). It did not

[5]At the same time, the harm to an individual caused by limited public distribution is likely to be minimal. As this Court recognized, the distribution of a report within Congress is itself "public" in the sense that internally circulated copies of the report, unless sheltered by specific congressional order, would have been available for public inspection by the press and the public (see 412 U.S. at 317).

consider, let alone foreclose, any arguments concerning qualified immunity.[6]

This Court has recognized the availability of qualified immunity for state officials sued under circumstances in which they do not have absolute immunity (see *Procunier* v. *Navarette*, No. 76-446, decided February 22, 1978; *Wood* v. *Strickland*, 420 U.S. 308; *Scheuer* v. *Rhodes*, 416 U.S. 232), and the courts of appeals are uniform in holding that qualified immunity is available to federal officials in similar circumstances (see *Bivens* v. *Six Unknown Named Agents*, 456 F. 2d 1339 (C.A. 2); *Apton* v. *Wilson*, 506 F. 2d 83 (C.A.D.C.); cf. *Davis* v. *Passman*, 544 F. 2d 865 (C.A. 5), pending on rehearing).

The record in this case establishes the requisites of qualified immunity. All printing and distribution of the report was required by statutory directive, standing order or congressional order. The Printer defendants acted in good faith and with a reasonable belief that their actions were proper (Pet. App. 14a). At the time of distribution, they had no notice of any objection to the report, and once they received notice they halted distribution.

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[6]Petitioners contend (Pet. 3 n. 1) that the question whether legislative officials have either absolute Speech or Debate Clause immunity or no immunity at all is also presented in *Powell* v. *Dellums*, petition for a writ of certiorari pending, No. 77-955. This is incorrect. No question of Speech or Debate Clause immunity—or the relationship between it and other forms of immunity—was before the court of appeals in *Dellums*, and none is presented in the petition. The petition discussed only official immunity, arguing that the persons involved are entitled to absolute official immunity rather than qualified official immunity.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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